

MICHAEL RODAK, JR., CL

No. 72 - 1355

In the Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM EARL MATTLOCK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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v.

WILLIAM EARL MATTLOCK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming an order suppressing evidence.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-8a) is not yet reported. The final opinion and order of the district court (App. C, *infra*, pp. 10a-20a) are not reported. Two earlier opinions of the district court which were superseded by its final opinion appear in Appendices D and E, *infra*, pp. 21a-32a.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 9a) was entered on February 5, 1973. On

(1)

February 26, 1973, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to April 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, to establish the validity of a warrantless search consented to by a third party reasonably appearing to have authority to consent to the search, the government must prove that the consenting party also had the actual authority to consent to the search.
2. Whether, in opposing a motion to suppress evidence on the ground that the consent to the search was not valid, the government must prove the sufficiency of the consent "to a reasonable certainty."
3. Whether the hearsay rule applies to the introduction of evidence at suppression hearings and, if so, whether the out-of-court statements by respondent and a woman that they were married were inadmissible to show their joint occupancy of the bedroom which the woman authorized police officers to search.

STATEMENT

Respondent was indicted for bank robbery (18 U.S.C. 2113) in the United States District Court for the Western District of Wisconsin. In the district court, respondent moved to suppress certain items, including \$4995 in cash, that had been seized in the course of three searches of the house in which he rented a bedroom. This motion was granted as to some of the items and denied as to others (App. C, *infra*). On appeal by the United States, the court of appeals affirmed (App. A, *infra*).

1. On the morning of November 12, 1970, respondent was arrested by local police officers in the yard of a house rented by Mr. and Mrs. Walter Marshall in Pardeeville, Wisconsin (App. C, *infra*, pp. 10a-11a). No question is raised as to the validity of the arrest.

At the time of the arrest the house was occupied by Mrs. Marshall, her three children (including her daughter Mrs. Gayle Graff), Mrs. Graff's young son, and respondent (App. C, *infra*, p. //a). Gayle Graff, respondent, and the child had been living at the house since the preceding summer; they had previously lived together in Florida for several months (*ibid.*). Respondent occupied a bedroom on the east side of the second floor of the house (the "east bedroom") and had agreed to pay the Marshalls twenty-five dollars per week for room and board (*ibid.*). He was current in these payments, or nearly so, at the time of his arrest (App. C, *infra*, pp. 11a-12a).

It is undisputed that respondent and Mrs. Graff were not married to one another. However, at various times and places, and to various persons, they each represented that they were married or made statements indicating that they were husband and wife (App. C, *infra*, p. 15a). There was also additional evidence tending to show that at least from time to time they occupied the east bedroom together (App. C, *infra*, pp. 15a-16a).

Shortly after respondent's arrest, three local police officers went to the door of the Marshall house and were admitted by Mrs. Graff (App. C, *infra*, p. 12a). The officers told her that they were looking for money and a gun they believed to be hidden in the house, and

~~believed to be hidden in the house, and they asked~~
they asked if they could make a search (*ibid.*). Although the officers did not inform Mrs. Graff of a right to withhold consent, she did consent to a search, without inquiring into the existence of such a right (*ibid.*).¹ Mrs. Graff told the officers that she and respondent together occupied the east bedroom (*ibid.*). None of the officers asked Mrs. Graff whether respondent occupied the room as a guest or as a paying tenant, whether she and respondent were married, or whether they had been living together as husband and wife, and Mrs. Graff said nothing to the officers on these subjects (*ibid.*).

In searching the bedroom, the police officers discovered and seized \$4995 in cash concealed in the closet (App. A, *infra*, p. 2a).²

¹ The question whether investigating officers are required as a condition of a valid consent search to inform the consenting party of the right to withhold consent was not considered by the courts below. However, we note that this question is before this Court, in a somewhat different factual setting, in *Schneckloth v. Bustamonte*, No. 71-732, argued October 10, 1972.

² In addition to the cash, certain other items were also discovered and seized in the course of later searches of the east bedroom and the remainder of the house. The district court ordered some of those other items suppressed and we do not here contest their suppression. These other items were seized pursuant to consent given later in the day by Mrs. Marshall. To the extent the searches extended to the bedroom, the court concluded that Mrs. Marshall (who authorized the search) lacked authority to do so by reason of the rental agreement she had with respondent. The court conceded, however, that the officers who conducted the search had reasonably supposed that Mrs. Marshall possessed the authority she purported to exercise (App. C, *infra*, p. 18a). We disagree with the court's holding for the same reason we dispute its holding with respect

2. The district court held that where consent given by a third person is relied upon as the justification for a search, the government has the burden of proving, not only that the consent was voluntary and that it reasonably appeared to the officers that the person had authority to consent, but also that the person had actual authority to permit the search. The court found that Mrs. Graff's appearance and statements at the time of the search reasonably indicated to the investigating officers that she and respondent jointly occupied the east bedroom; the court therefore concluded that "just prior to the search, it reasonably appeared to the searching officers that facts existed which would render [Mrs.] Graff's consent [to the search of the east bedroom] binding on [respondent] * * *" (App. C, *infra*, p. 14a). However, the court ruled that the government had failed to establish that respondent and Mrs. Graff had in fact jointly occupied the east bedroom and concluded that Mrs. Graff did not have actual authority to consent to the search.³

to the fruit of the search authorized by Gayle Graff (see *infra*)—that it mistakenly makes the lawfulness of a search depend on facts other than the situation as it reasonably appeared to the officers. However, the issue of the legality of the later seizures involves a distinct and unrelated question. We do not seek further review of that issue. The questions of general importance that we believe are involved in the case are adequately presented in the context of the morning search of the bedroom, and analysis of the issues is simplified by limiting the discussion to it.

³ In reaching this conclusion, the court expressly disregarded testimony about out-of-court statements made by respondent and Mrs. Graff to the effect that they were married. The court also refused to consider Mrs. Graff's statements to the investigating officers that she shared the bedroom with respond-

The court therefore suppressed the evidence obtained from the east bedroom during the course of the search.

The court of appeals affirmed, holding that the validity of the search depended on proof of actual authority to consent, not merely apparent authority; that the government had to prove actual authority "to a reasonable certainty, by the great weight of the credible evidence" (App. A, *infra*, p. 6a);⁴ and that the extra-judicial statements had been properly excluded from the suppression hearing as hearsay.

REASONS FOR GRANTING THE WRIT

This case involves important questions of criminal law. The courts below, in holding that valid consent to a warrantless search may not be given by one who reasonably appears to have, but actually does not (or may

ent. The district court considered these statements inadmissible hearsay and the court of appeals agreed. We discuss below why we believe this evidence was properly admissible and why this Court should review the question (pp. 11-13, *infra*).

⁴ The district court had stated in its opinion that the burden of proof borne by the government was proof "to a reasonable certainty, by the *greater* weight of the credible evidence" (App. C, *infra*, p. 16a; emphasis added). (This is in conformity with the approved standard of proof for civil trials in Wisconsin state courts. See 1 Wisconsin Board of Circuit Judges, *Wisconsin Jury Instructions-Civil* 200 (1972).) In its brief in the court of appeals the government inadvertently misquoted the standard as requiring proof "to a reasonable certainty, by the *great* weight of the credible evidence" (emphasis added) and contended that this posed an erroneously heavy burden of proof. Neither respondent nor the court of appeals noticed the discrepancy or considered it significant enough to advert to. The court of appeals, in affirming the suppression order, approved and applied the formulation that had been quoted in the government's brief. We challenge that standard here (pp. 10-11, *infra*).

not) have, authority to consent to the search, improperly extended the prohibition of the Fourth Amendment to searches and seizures which are in fact reasonable in light of the circumstances confronting the officers conducting the search. This result is contrary to the express language of the Amendment and to the decisions of this Court, see, e.g., *Hill v. California*, 401 U.S. 797, and represents an unwarranted extension of the exclusionary rule not supported by its rationale. Furthermore, in approving the district court's judgment the court of appeals applied a burden-of-proof standard which this Court has held to be inappropriate for the determination of facts at suppression hearings. *Lego v. Twomey*, 404 U.S. 477. Finally, the decision below raises the question whether the rules of evidence applicable at trial—here the hearsay rules—apply in pre-trial hearings; even if they should apply, the decision approving the exclusion of some of the government's evidence as "hearsay" has seriously misapprehended the nature and purpose of the hearsay rule.

1. The courts below properly recognized that either of two persons jointly occupying premises, and sharing rights of use and possession, may validly consent to a search of the area subject to joint control. See, e.g., *United States v. Johnson*, 413 F. 2d 1396, 1400 (C.A. 5); *United States v. Mackiewicz*, 401 F. 2d 219, 223-224 (C.A. 2), certiorari denied, 393 U.S. 923; *United States v. Alloway*, 397 F. 2d 105, 108-110 (C.A. 6). Cf. *Frazier v. Cupp*, 394 U.S. 731. It is well understood that this rule applies to unmarried persons living together as husband and wife. See, e.g., *Gurleski v. United States*, 405 F. 2d 253, 260-262 (C.A. 5),

certiorari denied, 395 U.S. 981; *United States v. Airdo*, 380 F. 2d 103, 105-107 (C.A. 7), certiorari denied, 389 U.S. 913; *Nelson v. California*, 346 F. 2d 73, 77 (C.A. 9), certiorari denied, 382 U.S. 964.

Moreover, the courts below acknowledged that the circumstances surrounding the search here in question, coupled with the statements made to the investigating officers by Mrs. Graff, the consenting party, made it reasonably apparent to the officers that she and respondent were jointly occupying the east bedroom. The further questions litigated below—whether a person reasonably appearing to be a joint occupant was one in fact, and, if not, whether a warrantless search conducted with her consent was valid—have seldom arisen in cases heretofore, because ordinarily there is no challenge to the status as joint occupant of the person who consented in that apparent capacity. We submit that whether the consenting party and the party seeking suppression are in fact joint occupants is irrelevant to the reasonableness of the search: the proper test is whether in the circumstances confronting them the investigating officers acted reasonably in concluding that the consenting party was a joint occupant and thereby authorized to consent to the search.

The Fourth Amendment by its terms protects against only "unreasonable" searches and seizures. In conducting an investigation, police officers must act on the basis of the facts as they appear at the time; what the Fourth Amendment requires is that their actions be reasonable. If police action is reasonable at the time it is undertaken, a subsequent discovery that the officers were misled by deceiving appearances does not

change the fact that their action was reasonable. Thus the California Supreme Court concluded, in *People v. Gorg*, 45 Cal. 2d 776, 783:

[W]hen as in this case the officers have acted in good faith with the consent and at the request of a home owner in conducting a search, evidence so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner's authority.

See, also, *Gurleski v. United States, supra*, 405 F. 2d at 261.

Furthermore, exclusion of evidence because the police made a reasonable mistake as to the actual authority of the consenting party would frustrate legitimate law enforcement without advancing the interests served by the exclusionary rule. The purpose of the exclusionary rule is to eliminate an incentive for lawless invasions of privae by the police. *Mapp v. Ohio*, 367 U.S. 643, 656; *Elkins v. United States*, 364 U.S. 206, 217. The application of the exclusionary rule, when it is conceded that the investigating officers reasonably believed they were being given effective consent to search, is obviously pointless; by definition it cannot have the effect of discouraging "lawless" conduct, and on the contrary it serves only to frustrate the search for truth by excluding probative evidence.

The decision below thus conflicts with this Court's holding in *Hill v. California*, 401 U.S. 797. In that case the Court sustained the legality of a search incident to the arrest of the wrong man, on the ground that the mistake in identity was reasonable. As the

Court there noted (401 U.S. at 804), "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." The same reasoning applies here. It was sufficient for Fourth Amendment purposes that the investigating officers responded reasonably to the facts as they appeared, in accepting as true the evidently credible statement by Mrs. Graff that she and respondent shared the east bedroom and in proceeding with confidence that they were validly authorized to search it.

2. Whether actual authority or apparent authority is the test of valid consent for Fourth Amendment purposes, the court below applied a legally erroneous standard of proof to the government's burden.⁵ Even assuming *arguendo* that the courts below were correct in requiring the government to establish that the consenting party was in fact a joint occupant of the searched premises, the proper burden of proof to be borne by the government is merely that of the preponderance of the evidence. But the standard of proof approved and applied by the court of appeals required the government to prove actual authority "to a reasonable certainty". Only last Term this Court expressly rejected the contention that the voluntariness of a confession offered by the govern-

⁵ We do not contend that the government does not bear the burden of proof. See *Vale v. Louisiana*, 399 U.S. 30, 34; *Chimel v. California*, 395 U.S. 752, 761; *Bumper v. North Carolina*, 391 U.S. 543, 548.

ment must be proved beyond a reasonable doubt, holding instead the admissibility of a confession challenged on Fifth Amendment grounds is to be judged by the same standard, preponderance of the evidence, properly applicable to evidence opposed on Fourth Amendment grounds. *Lego v. Twomey*, 404 U.S. 477, 488. Thus the court below was in clear error in applying the standard it did to the government's effort to show that the evidence had been lawfully seized.

3. In addition, even if the courts below were correct in requiring the government to prove that Mrs. Graff was in fact as well as appearance a joint occupant of the east bedroom, they erred in holding inadmissible the out-of-court statements made by her and respondent indicating that they were living together as husband and wife.

Even if that evidence was hearsay, it should be admissible at a pretrial hearing on a suppression motion. It has long been stated as a general principle that “[i]n preliminary rulings by a judge on the admissibility of evidence, the ordinary rules of evidence do not apply.” 5 Wigmore, *Evidence* § 1385 (3d ed. 1940) (emphasis in original). Hearsay and other technical rules of evidence should be inapplicable at such interlocutory proceedings before the court “because there is no jury, and the rules of Evidence are, as rules, traditionally associated with a trial by jury.” 1 Wigmore, *Evidence* § 4 (3d ed. 1940). Yet, as the decision below shows, the question has never been decisively settled for the federal courts. A related problem was involved in *Brinegar v. United States*,

338 U.S. 160, where this Court upheld the introduction at a suppression hearing of evidence which would have been inadmissible at trial, noting that evidence that would not be admissible at a trial to prove guilt could be admitted at a suppression hearing to show that officers acted on the basis of probable cause. Cf. *McCray v. Illinois*, 386 U.S. 300. The present case presents the more basic, underlying issue whether normally inadmissible evidence—hearsay—can be used at a pretrial hearing to prove an affirmative fact necessary for the admissibility of other evidence at trial. This is an important question in the administration of criminal justice and should be settled by this Court. Compare *Chambers v. Mississippi*, No. 71-5908, decided February 21, 1973.*

Furthermore, even if the hearsay rule does apply to suppression hearings, the courts below erred in refusing to consider, on the issue of joint occupancy, the statements by respondent and Mrs. Graff that they were married. These statements were not hearsay: they were offered not to prove the truth of the matter asserted, i.e., the existence of a valid marriage, but rather as circumstantial evidence on the issue of joint occupancy. See 5 Wigmore, *Evidence* § 1361 (3d ed. 1940); McCormick, *Evidence* § 225 (1954); Rule 801 (c) of the Proposed Federal Rules of Evidence. When a man and woman publicly and repeatedly proclaim that they are married (even though they in fact are

* Rule 104 of the Proposed Federal Rules of Evidence would expressly provide that in determining the admissibility of evidence the judge "is not bound by the rules of evidence * * *." Under Pub. L. 93-12, signed by the President on March 30, 1973, the effectiveness of those rules is indefinitely suspended until further affirmative action by Congress.

not), a reasonable inference can be drawn that they are living together as spouses and sharing a common abode. The government was erroneously denied the benefit of evidence supporting that inference.⁷

In addition, evidence of respondent's statements that Mrs. Graff was his "wife" would be admissible even to prove such a fact, since under settled principles an out-of-court statement made by an adverse party is admissible against him as an admission. McCormick, *Evidence* § 239 (1954); 4 Wigmore, *Evidence* § 1048 (3d ed. 1940); Rule 801(d)(2) of the Proposed Federal Rules of Evidence.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be granted.

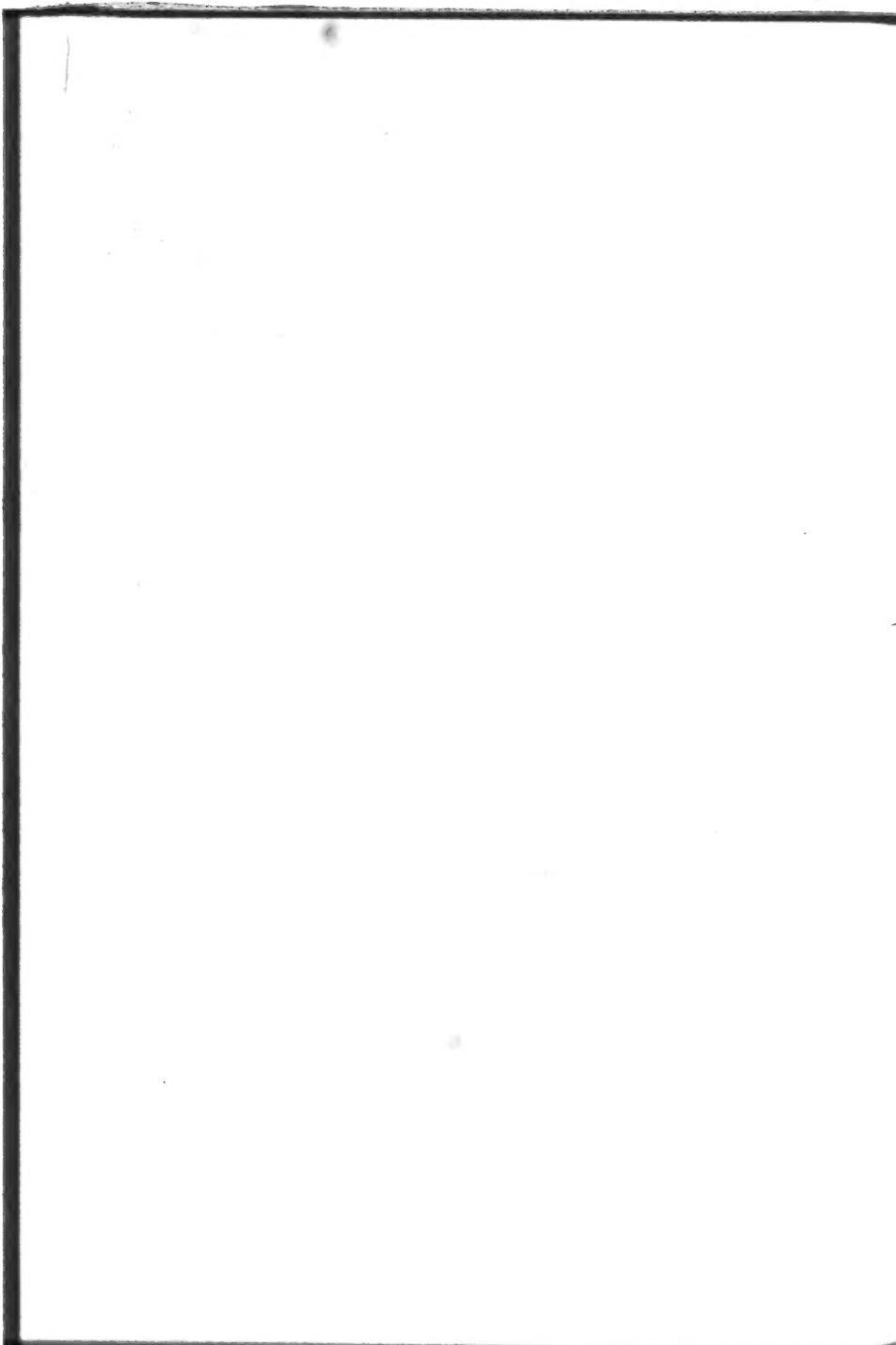
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APRIL 1973.

⁷ It was necessary as a practical matter to introduce evidence of the out-of-court statements since at the suppression hearing Mrs. Graff refused to say whether she and respondent had been cohabiting, claiming her privilege against self-incrimination (1 Tr. 101-102). ("1 TR." refers to the transcript of the proceedings of April 5, 1971, a copy of which has been lodged with the clerk of this Court.)



APPENDIX A

In the United States Court of Appeals for the
Seventh Circuit

SEPTEMBER TERM, 1972—SEPTEMBER SESSION, 1972

No. 72-1449

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT
v.

WILLIAM EARL MATTLOCK, DEFENDANT-APPELLEE

*Appeal from the United States District Court for the
Western District of Wisconsin. No. 71 CR 13.
James E. Doyle, Judge*

Argued November 30, 1972—Decided February 5, 1973

Before HASTINGS, Senior Circuit Judge, CAMPBELL,
Senior District Judge,* and MORGAN, District Judge.*

MORGAN, *District Judge*. This appeal is prosecuted by the United States to review an order of the court below suppressing certain evidence seized by state officers and FBI agents in three separate warrantless searches of a residence house.

On November 12, 1970, at about 9:30 a.m., sheriff's officers of Columbia County, Wisconsin, arrested defendant, a bank robbery suspect, in the yard of a residence house rented by a Walter Marshall and

*Senior District Judge William J. Campbell of the United States District Court for the Northern District of Illinois and Chief Judge Robert D. Morgan of the United States District Court for the Southern District of Illinois are sitting by designation.

Elaine Marshall, the arrest being made some distance from the house itself. Residents of the house at the time were Elaine Marshall, Gayle Graff, a daughter of the Marshalls, Graff's infant son, at least two younger Marshall children, and the defendant.

Immediately after the arrest, certain of the officers went to the house and were admitted by Graff. The officers told Graff that they were looking for money and a gun and wished to search the house. Graff consented. The officers seized \$4,995 and certain other items from a closet and a dresser drawer in a second floor bedroom, identified in the record as the east bedroom.

The same officers conducted a second search shortly after the first was concluded. Graff again admitted them to the house and consented to a further search.¹ Certain items were then seized from a closet on the first floor of the house. The second search began about 10:15 a.m.

The third search was conducted about 4:30 p.m. of the same day by FBI agents and local officers. Three of the officers were admitted to the house by one of the younger children, where they waited while the fourth officer involved brought Mrs. Marshall from her place of employment to the house. Mrs. Marshall signed a written consent to search. During that search, certain items were seized from a dresser drawer in the east bedroom. Others were seized from locations on the first floor.

Following extensive evidentiary hearings, the court found and concluded that the government had proved that it reasonably appeared to the several officers, just prior to the searches, that facts existed in each in-

¹The court did not consider the question whether Graff's consents were voluntary, in light of the fact that she was never advised that she had the right to refuse consent.

stance from which the officers could reasonably believe that both Graff and Mrs. Marshall had authority to consent to a search and that their respective consents would be binding upon the defendant. The evidence related to Graff's apparent authority to consent was that she and defendant, among others, resided in the house; that she admitted the officers while dressed in night clothes and a robe; that she then told the officers that she and defendant both occupied the east bedroom, and that women's clothing therein contained were hers; and that she had told the officers that she used the two upper drawers of a dresser in the room and the defendant used the two lower drawers.

The appearance of Mrs. Marshall's authority was found in the fact that she and her husband were the lessees of the whole premises from a third party owner. Though finding apparent authority to consent, the trial judge expressed his incredulity of the fact that none of the officers had asked Mrs. Marshall about the arrangement under which defendant occupied the east bedroom.

The judge expressed a reservation as to search of the bottom two dresser drawers, since there was no testimony as to whether Graff's statement that defendant, only, used those drawers was made before or after the search, saying that if the information was known prior to the search, there was no apparent authority to bind defendant by Graff's consent.

From Mrs. Marshall's testimony, the court found that a rental agreement had existed between defendant and Mrs. Marshall, pursuant to which he paid her \$25.00 per week for the use of the east bedroom and board. The court found and concluded that prior to the several searches, facts did not exist which would render the consent of either Graff or Mrs. Marshall

to a search of the east bedroom binding upon the defendant.

In that regard, the court refused to consider the hearsay evidence that Graff had stated to the searching officers that she occupied the east bedroom with the defendant, and that certain clothing there located was hers, as substantive evidence that the room was jointly occupied by her and the defendant.²

The court ordered that all evidence seized from the east bedroom be suppressed. Defendant's motion to suppress evidence seized from other areas of the house was denied on the ground that defendant had no standing to object to a search of any part of the house except the east bedroom.

The government's principal contention against the suppression order is that appearance of authority to consent satisfies Fourth Amendment requirements, and that the court erred in requiring proof of facts showing actual authority to consent. Thus, the government argues that an imposter, having no connection with a residence searched, would bind a putative defendant if it reasonably appeared to the searching officer that the imposter had the right to consent to a search. Statement of the argument is largely its own refutation. Furthermore, the government bases its position to a great extent upon *United States v. Rabinowitz*, 339 U.S. 56 (1950). *Rabinowitz* can only be viewed as shaky authority, since the broad rationale of that case was quite generally overruled in *Chimel v. California*, 395 U.S. 752, 768 (1969).

² That hearsay evidence was admitted and considered for its bearing upon the question of the reasonableness of appearance to the officers of Graff's authority to bind defendant by her consent.

Security in one's home from unreasonable searches and seizures is a personal right, e.g., *Stoner v. California*, 376 U.S. 483, 489 (1964); *Anderson v. United States*, 399 F. 2d 753, 755 (10 Cir., 1968), not to be eroded "by unrealistic doctrines of 'apparent authority.'" *Stoner v. California, supra*, at 488.

One of joint occupants of a residence may consent to a search of the premises jointly occupied and by his consent bind the nonconsenting occupant to face the evidence seized. E.g., *United States v. Stone*, No. 71-1580, 7 Cir., decided November 29, 1972; *United States v. Airdo*, 380 F. 2d 103 (C.A. 7 1967), cert. denied, 389 U.S. 913. The government relies wholly on such cases. *United States v. Wixom*, 441 F. 2d 623 (C.A. 7 1971); *United States v. Botsch* 364 F. 2d 542 (C.A. 2 1966), cert. denied, 386 U.S. 937; and *Drummond v. United States*, 350 F. 2d 983 (C.A. 8 1965), cert. denied, 384 U.S. 944, all involving consent by one of partners in crime to search premises to which all had equal access; *United States v. Airdo, supra*, involved admitted joint occupancy; *Burge v. United States*, 342 F. 2d 408 (C.A. 9 1965), cert. denied, 382 U.S. 829, joint occupants of a bathroom searched; *Weaver v. Lane*, 382 F. 2d 251 (C.A. 7 1967), cert. denied, 392 U.S. 930, consent by hostess to search room of temporary visitor; *Gurleski v. United States*, 405 F. 2d 253 (C.A. 5 1968), involved joint use and possession of automobile. It is equally clear that a landlord cannot by his consent waive a tenant's right to be free from an unreasonable search. *Chapman v. United States*, 365 U.S. 610 (1961). Nor can a person having no right of occupancy of premises bind another by his consent to a search of the premises. *Stoner v. California, supra*.

A comparison of the many cases reveals that a vicarious consent is sustained only when actual authority to consent is shown to have existed when consent was given. In our view, Judge Doyle has simply articulated the correct principle which courts until now have applied without clear articulation thereof. He correctly held that defendant's constitutional rights could be waived only if it was proved that reasonable appearance of authority to consent existed and, also, that just prior to the search, facts existed showing actual authority to consent. We cannot reject his finding that the government failed to prove that actual authority did exist. Such actual authority is, of course, to be distinguished from actual permission to consent, which need not be proved.

The court below correctly placed the burden upon the government to prove that defendant's Fourth Amendment rights were waived. *E.g., Vale v. Louisiana*, 399 U.S. 30, 34 (1970); *Chimel v. California*, 395 U.S. 752, 761 (1969); *Stoner v. California*, 376 U.S. 483, 486 (1964). The government appears before the court asserting misplaced reliance upon inapposite cases dealing with either the challenged validity of a search warrant or the issue of standing to move to suppress seized evidence. *E.g., Jones v. United States*, 362 U.S. 257, 261 (1960), and *Brandon v. United States* 270 F. 2d 311, 312-313 (D.C. Cir., 1959), *cert. denied*, 362 U.S. 943 (issue was standing to pursue motion to suppress); *United States v. Rellio*, 39 F. Supp. 21 (E.D. N.Y., 1941) (challenged legality of a warrant).

The government also challenges the court's statement that the authority of the consenter to bind a putative defendant must be proved "to a reasonable certainty, by the great weight of the credible evidence" as applying an erroneous standard of proof.

The sustaining of the contention that a constitutional right has been waived invokes a high standard of proof of facts showing waiver. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *United States v. Coleman*, 322 F. Supp. 550, 553 (E.D. Pa., 1971); *United States v. Cole*, 325 F. Supp. 763, 768 (S.D. N.Y., 1971). The district court's statement of the standard of proof required to prove the fact of authority to bind defendant is consistent with the principle enunciated in those cases and is not subject to abstract criticism.

Finally, the government contends that the court erroneously excluded extra judicial statements and other hearsay evidence as bearing upon the issue of the existence of actual authority to bind the defendant by Graff's consent. Thus, the court excluded Graff's hearsay statements to officers that she occupied the east bedroom with defendant and testimony that both defendant and Graff had stated publicly several times that they were married. The evidence was properly excluded pursuant to the well established rule that hearsay is not admissible as substantive evidence to prove the existence of a fact in issue. *Bridges v. Wixon*, 326 U.S. 135, 153-154 (1945); 29 Am. Jur. 2d, Evidence, §§493, 495. The hearing below cannot be equated with that on a petition for a search warrant, as the government contends. An unreasonable, warrantless search is not insulated against constitutional objection by the fact that probable cause did in fact exist. *Vale v. Louisiana*, *supra*, at 341; *Chimel v. California*, *supra*, at 762. A search warrant should have been obtained in this case.

The record supports the findings that a rental agreement did exist between defendant and Mrs. Marshall, and that there was no proof of facts showing actual

authority in either Graff or Mrs. Marshall to consent to a search of the east bedroom.

The court below did not direct what disposition was to be made of the cash and other evidence suppressed. It should do so. The judgment will be affirmed and the cause remanded to the court below for that determination and such further proceedings as may be required.

Affirmed and Remanded.

A true copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

United States Court of Appeals for the Seventh
Circuit

FEBRUARY 5, 1973

No. 72-1449

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

WILLIAM EARL MATTLOCK, DEFENDANT-APPELLEE

Before Hon. JOHN S. HASTINGS, Senior Circuit Judge,
Hon. WILLIAM J. CAMPBELL, Senior District Judge,
Hon. ROBERT D. MORGAN, Chief District Judge

*Appeal From the United States District Court for the
Western District of Wisconsin*

This cause came on to be heard on the transcript
of the record from the United States District Court
for the Western District of Wisconsin, and was argued
by counsel.

On consideration whereof, it is ordered and ad-
judged by this court that the judgment of the said
District Court in this cause appealed from be, and
the same is hereby, AFFIRMED, and this cause
be and the same is hereby REMANDED to the said
District Court, in accordance with the opinion of this
Court filed this day.

(9a)

(9b)

APPENDIX C

**In the United States District Court for the Western
District of Wisconsin**

[Filed March 9, 1972]

71-CR-13

UNITED STATES OF AMERICA, PLAINTIFF

v.

WILLIAM EARL MATTLOCK, DEFENDANT

OPINION AND ORDER

The defendant has moved to suppress the fruits of three searches of the Walter Marshall home in a rural area near Pardeeville, Columbia County, Wisconsin, in this district, on November 12, 1970. Two evidentiary hearings have been held. I have concluded that the burden is upon the Government to prove, to a reasonable certainty, by the greater weight of the credit evidence, all of the facts necessary to establish that the warrantless search was not "unreasonable", within the meaning of the Fourth Amendment. On this basis, I find the facts as they are set forth in the following section of this opinion. The findings of fact and conclusions of law set forth in this opinion supersede any findings or conclusions heretofore entered with respect to the motion to suppress.

FACTS

At about 9:30 a.m., November 12, 1970, several local law enforcement officers went to the Marshall home for the purpose of arresting the defendant, and they

(10a)

did arrest him in the yard of the home, some substantial distance from the house. The defendant offered no resistance, and he was placed in a squad car parked some distance from the house. The first of the three searches of the house commenced immediately thereafter.

At no time on November 12, 1970, was a search warrant obtained by any law enforcement officers for the purpose of conducting a search of the Marshall home. There was adequate time to obtain one or more warrants. There was no emergency, nor danger to any police officer or other persons which required that the search proceed without awaiting the time at which a search warrant could be applied for. The search of the house was not incidental to the arrest of the defendant.

For some time prior to November 12, 1970, and on that day, the house was rented by Walter Marshall and Elaine Marshall, husband and wife, from the owner, and was occupied by Elaine Marshall, her 13 year old daughter Kathleen, her 16 year old son Steven, and perhaps other family members, and also by a daughter Gayle Graff, by Gayle's three year old son, and by the defendant. Gayle Graff and her son had been living in Florida. They had come to Wisconsin with the defendant in the summer of 1970, and they had been living at the Marshall home continually thereafter to and through November 12, 1970. At no time prior to, or on November 12, 1970, were Gayle Graff and the defendant married to one another. The defendant occupied a bedroom on the east side of the second floor (referred to hereinafter as the east bedroom). There was an agreement between Mr. and Mrs. Marshall and the defendant that he would pay them \$25 per week for the room and his board. He was current in his payments, or nearly so, as of Novem-

ber 12. At no time did the defendant consent to a search of any part of the house.

On the occasion of the first search on November 12, three local law enforcement officers went to the door of the house at about 9:45 a.m. They were admitted by Gayle Graff who was dressed in a robe and was carrying her son. One of the officers believed, from earlier observation of the house, that Gayle was living there. The officers told her that they were looking for money and a gun. At this time the officers did not know where in the house, if anywhere, the money or gun was located, nor did they know which part of the house, if any, had been occupied by the defendant. They asked Gayle whether they could search the house. They did not tell her that she was not required to consent to the search. She consented. She told the officers that the east bedroom was occupied by the defendant and by her. She then consented to a search of the east bedroom. She told the officers that she used the top two drawers of a dresser in the east bedroom and the defendant used the bottom two drawers. None of the officers made any inquiries concerning whether the defendant occupied the east bedroom as a guest or as a paying tenant, nor whether the defendant and Gayle were married or whether they had been living together regularly in the Marshall house or elsewhere, and nothing was said to the officers on these subjects. Certain items were found by the searching officers in the second drawer from the bottom of the dresser and in the closet of the east bedroom.

The second search occurred at about 10:15 a.m., within a few minutes after the conclusion of the first search. The same local officers returned to the house and were admitted by Gayle Graff. They said that they wished to continue their search. They did not tell her that she was not required to consent. She con-

sented. Certain items were found in a downstairs pantry.

The third search occurred at about 4:30 p.m. Two special agents of the Federal Bureau of Investigation and two local law enforcement officers participated in it. The two special agents and one of the local officers went to the Marshall house at about 3:30 p.m. They were admitted to the house by Steven. They sat in the kitchen and conversed with Steven. Elaine Marshall was brought to the house by the second local officer. The officers introduced themselves to her, told her they wished to search the house, and informed her that she had a right to decline. She executed a written consent to a search of the entire house. She told them that she and her husband rented the house. No inquiry was made concerning whether the defendant had been living in the house as a paying or non-paying guest. The search was made. Certain items were found in a drawer of the dresser in the east bedroom, and certain items downstairs.

OPINION

In testing whether each of the three searches was "unreasonable," within the meaning of the Fourth Amendment, I will apply the following rule: that a warrantless search of a house and of a particular part of a house, which search is not incidental to an arrest and is not required by some emergency to be conducted without awaiting a warrant, is unreasonable, within the meaning of the Fourth Amendment, unless the search of the house and of the particular part of the house is freely and voluntarily consented to, and the following conditions are met:

- (1) it reasonably appears to the searching officers, just prior to the search, that facts exist which

will render the consenter's consent binding on the putative defendant; and also

- (2) just prior to the search, facts do exist which render the consenter's consent binding on the putative defendant.

(A) THE FIRST SEARCH IN THE MORNING

With respect to the first search of the east bedroom on the second floor in the morning, I conclude that just prior to the search, it reasonably appeared to the searching officers that facts existed which would render Gayle Graff's consent binding on the defendant Mattlock. That is, the defendant's presence in the yard of the house at the time of his arrest just prior to the search, Gayle Graff's residence in the house for some time and her presence in the house just prior to the search, her attire just prior to the search, and her statement to the officers that she and the defendant occupied the east bedroom were sufficient to create a reasonable appearance to the officers that she and the defendant jointly occupied that space and that her consent to a search of that space would be binding upon the defendant. I conclude that the reasonableness of this appearance does not depend upon whether the two persons appeared to the officers to be married or unmarried, nor upon whether their joint occupancy of the bedroom had continued over a relatively long or short period of time, so long as it appeared to have been for a period of reasonable length.

However, I conclude that the government has failed to meet its burden of proof that facts did indeed exist which rendered Gayle Graff's consent to a search of the east bedroom binding on the defendant Mattlock. The proof as to the reality, rather than the appearance, may be summarized as follows:

Gayle Graff told the searching officers that she and the defendant occupied the east bedroom and that they shared the bedroom dresser. She told the federal agents on November 12, after the two morning searches but prior to the afternoon search, that she and the defendant had been sleeping together in the east bedroom regularly, including the early morning of November 12. These extra-judicial statements are not admissible to prove the truth of the statements.

At various times and places and to various persons, Gayle Graff made statements and the defendant made statements indicating that they were wife and husband. The government urges, correctly, that it is entitled to prove that such statements were made. But these extra-judicial statements are not admissible to prove that the two were married (which they were not) or that they were sleeping together as a husband and wife might be expected to do.

From about April to August, 1970, Gayle Graff and the defendant lived together in a one-bedroom apartment in Florida. I find this testimony credible, and also conclude that it permits a mild inference that they slept together at times later in 1970 in her parents' home in Wisconsin.

While the defendant and Gayle Graff were living in the Marshall home from about August to November 12, 1970, they were observed to go upstairs together six times or less, at unspecified hours of the day or night, but probably not later than early evening (since the witness was a 14 year old neighbor and frequent visitor). On a morning in September, 1970, some time prior to 9:00 a.m., a visitor observed Gayle Graff descend from the second floor, clad in a bathrobe and nightgown. A few minutes thereafter, he saw the defendant descend the stairs, completely clothed. I find this testimony credible, and also conclude that it permits a mild

inference that the two slept together at times in the east bedroom.

At the time of the search, there were two pillows in the double bed in the east bedroom; the bed had been slept in; in the closet, there was men's clothing and women's clothing; in two drawers of the dresser, there was women's clothing; in the other two drawers, there was men's clothing. I find this testimony credible, and I also conclude that it permits an inference that Gayle Graff and the defendant slept together at times in the east bedroom.

Gayle Graff told the searching officers that the women's clothing in the dresser was hers. This extra-judicial statement is not admissible to prove that the clothing was hers.

Excluding the inadmissible extra-judicial statements, I conclude that the government has failed to prove, to a reasonable certainty, by the greater weight of the credible evidence, that at the time of the search, and for some period of reasonable length theretofore, Gayle Graff and the defendant were living together in the east bedroom.

The government contends that only the test of appearance should determine whether a search is unreasonable within the meaning of the Fourth Amendment, and that an additional test of reality should not be applied. I cannot agree. To accept the government's view would require the court to receive against a defendant in a criminal case evidence obtained in a warrantless search of his home on the basis of consent given by an utter imposter who falsely claimed ownership of the home under plausibly deceiving circumstances. I believe that the test must be that the consenter was in truth, as well as in appearance, entitled to bind the putative defendant by consenting to the search.

Additionally and separately, I conclude that evidence taken from the bottom two drawers of the dresser cannot be received against the defendant Matlock, even if it were assumed that Gayle Graff and the defendant in fact jointly occupied and used the bedroom and the bedroom closet. The record does not disclose whether it was before or after the search of the dresser that Gayle Graff informed the officers that she used the top two drawers and he used the bottom two. If this information was given prior to the search, there was neither appearance nor reality to permit the defendant to be bound by Gayle Graff's consent to the search of the bottom two drawers. If this information was given after the search, and if it was true, the appearance test may have been met but not the reality test. I cannot determine whether the statement made to the searching officers by Gayle Graff about the dresser drawers was true or false, nor when it was made. But I conclude that the burden was upon the government to prove that the statement was not made until after the search and also that it was not true. The government has not met this burden.

I express no view whether the first search of the east bedroom was valid in the absence of advice to Gayle Graff that she was not obliged to consent to a search.

(B) THE SECOND SEARCH IN THE MORNING

The defendant has no standing to object to a search of any part of the house other than the east bedroom. Evidence found elsewhere in the second search in the morning (or in any search at any time) will not be suppressed.

(C) THE AFTERNOON SEARCH

With respect to the afternoon search of the east bedroom, I conclude that it reasonably appeared to the searching officers that the facts existed which would render Elaine Marshall's consent binding on the defendant Mattlock. That is, it reasonably appeared to them that Elaine Marshall and her husband were the lessees of the house, because she told them so and because she undertook to sign a written form of consent to the house.

I reach this conclusion with difficulty. By the time of the afternoon search, the federal agents had interviewed Gayle Graff and she had told them that she and the defendant had been sleeping together in the east bedroom regularly for some time prior to, and on, November 12. Assuming that these officers were determined to proceed later that afternoon to conduct a further search of the house without a warrant, as apparently they were, however inexplicably, the statements made to them by Gayle Graff might well have prompted them to inquire of Elaine Marshall concerning the arrangements, financial or otherwise, under which the defendant was occupying the east bedroom. But they made no such inquiry. To conclude, as I have, that they then might consider reasonable the appearance that Elaine Marshall was in a position to consent to the search of the east bedroom is to strain a point to its limits.

However, I conclude that the government has failed to meet its burden of proof that facts did indeed exist which rendered Elaine Marshall's consent to a search of the east bedroom binding on the defendant Mattlock. In the findings of fact set forth earlier in this opinion, I have found that there was an arrangement between Mr. and Mrs. Marshall and the defendant

that he would pay them \$25 per week for the use of the east bedroom and for his board; and that he was current in his payments, or nearly so, as of November 12. These findings are based upon the testimony of Elaine Marshall, called by the government as its witness at the suppression hearing, during the course of cross-examination by counsel for defendant Mattlock; which testimony was repeated by her at a resumed suppression hearing, when called by the government. Quite understandably, the government urges the court to refrain from this finding, emphasizing that when she was called as a witness by the government at yet another resumed suppression hearing, she was vague and evasive on the subject of the rental arrangement. There is no doubt that Elaine Marshall is an unimpressive witness and that she was vague and evasive on the subject of the rental arrangement by the time of her third appearance. But it was the government's burden to prove facts supporting the proposition that she was entitled to consent to the search of the east bedroom. I have observed earlier, and I continue in the view, that it is inherently credible that the Marshall's would seek payment from the defendant for his board and room. Also, the evidence is uncontradicted that after coming to the Marshall home, the defendant worked at a loggingmill for a time, and received two \$100 payments from a brother-in-law, which payments were about a month apart.

ORDER

For the reasons stated, and upon the basis of the entire record herein, IT IS HEREBY ORDERED that no evidence obtained from a search of the east bedroom of the Marshall home will be received at the trial of the defendant in this action. In all other re-

spects, the defendant's motion to suppress is denied.

Entered this 9TH day of March, 1972.

By the Court:

JAMES E. DOYLE,
District Judge.

APPENDIX D

In the United States District Court for the Western
District of Wisconsin

[Filed June 22, 1971]

71-CR-13

UNITED STATES OF AMERICA, PLAINTIFF

v.

WILLIAM EARL MATTLOCK, DEFENDANT

INTERIM OPINION

Upon reflection, following today's hearing and following a rereading of my opinion and order of May 28, 1971, and in view of a remark I made during today's hearing in a moment of confusion, I believe that there may be an ambiguity which may result in unfairness to counsel and the parties unless it is clarified promptly.

It appears to me that in the case of a warrantless search in which the government relies upon consent given by someone (the consenter) other than the person (the defendant) against whom the evidence found is sought to be introduced, there are these possible alternative rules:

1. The search is valid if it reasonably appeared to the officers, just prior to the search, that facts existed which would render the consenter's consent legally binding on the defendant, without regard to whether such facts did exist.

2. The search is valid only:

- (a) if it reasonably appeared to the officers, just prior to the search, that facts existed which would render the consenter's consent legally binding on the defendant; and
- (b) if, at the time of the search, facts did exist which rendered the consenter's consent legally binding on the defendant.

3. The search is valid if, at the time of the search, facts did exist which rendered the consenter's consent legally binding on the defendant, without regard to how the matter may have appeared to the officers just prior to the search.

I consider that my opinion of May 28, 1971, embraced alternative 2; that I held that, with respect to Gayle Graff's consent to the search of the east bedroom, condition 2(a) had not been met; that I held, as a separate and additional ground, that condition 2(b) had not been met; that I held that the plaintiff had not had fair warning that condition 2(b) would be imposed; and that I held that the government should have an opportunity for a further evidentiary hearing on condition 2(b). The government elected to take this opportunity and it presented evidence today with respect to condition 2(b).

If I adhere to my opinion of May 28, 1971, as I presently intend to do, I will continue to hold the search invalid because condition 2(a) has not been met. However, with respect to the alternative ground of the May 28, 1971 opinion, namely, that condition 2(b) had not been met, I will reopen that question, consider the evidence properly received at today's hearing, and make new findings and conclusions with respect to 2(b). If the matter were then to be reviewed by an appellate court, it would have the bene-

fit of my findings and conclusions on both 2(a) and 2(b).

With respect to whether the defendant is bound by Mrs. Marshall's consent to the search of the east bedroom, I understand the questions to be: (1) Is it permissible and, if so, just, to reopen the factual question concerning a rental arrangement between the defendant and the Marshalls? (2) If the factual question is to be reopened, what factual finding should now be made on the basis of the entire record of the two evidentiary hearings?

Entered this 22d day of June, 1971.

By the Court:

JAMES E. DOYLE,
District Judge.

APPENDIX E

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN**

[Filed May 28, 1971]

71-CR-13

UNITED STATES OF AMERICA, PLAINTIFF

v.

WILLIAM EARL MATTLOCK, DEFENDANT

OPINION AND ORDER

The defendant has moved to suppress the fruits of three searches of the Walter Marshall home in a rural area near Pardeeville, Columbia County, Wisconsin, in this district, made on November 12, 1970. An evidentiary hearing has been held. I find the facts to be as set forth in the following section of this opinion.

FACTS

At about 9:30 a.m., November 12, 1970, several local law enforcement officers went to the Marshall home for the purpose of arresting the defendant, and they did arrest him in the yard of the home, some substantial distance from the house. The defendant offered no resistance, and he was placed in a squad car parked some distance from the house. The first of the three searches of the house commenced thereafter.

At no time on November 12, 1970, was a search warrant obtained by any law enforcement officer for

the purpose of conducting a search of the Marshall home. There was adequate time to obtain one or more search warrants. There was no emergency, nor danger to any police officer or other persons which required that the search proceed without awaiting the time at which a search warrant could be applied for. The search of the house was not incidental to the arrest of the defendant.

The house was being rented at the time by Walter Marshall and Elaine Marshall, husband and wife, from the owner. The house was being occupied at the time by Elaine Marshall, her 13 year old daughter Kathleen, her 16 year old son Steven, and perhaps other family members, and also by a daughter Gayle Graff, by Gayle's three year old son, and by the defendant. Gayle Graff and her son had been living in Florida. They had come to Wisconsin with the defendant in the summer of 1970, and they had been living at the Marshall home continually thereafter to November 12, 1970. The defendant occupied a bedroom on the east side of the second floor (referred to hereinafter as the east bedroom). There was an agreement between Mr. and Mrs. Marshall and the defendant that he would pay them \$25 per week for the room and his board. He was current in his payments, or nearly so, as of November 12.¹ At no time did the

¹ I base the finding with respect to the rental arrangement on the testimony of Elaine Marshall. The government urges that I reject her entire testimony because her credibility was seriously impeached. However, it is inherently credible that the Marshalls would seek payment from the defendant for his board and room. There is uncontradicted evidence, and I find, that he worked at a logging mill nearby for a time and that he received two \$100 payments from a brother-in-law after coming to Wisconsin, and that there was an interval of about one month between the two payments.

defendant consent to a search of any part of the house.

On the occasion of the first search on November 12, three local law enforcement officers went to the door of the house at about 9:45 a.m. They were admitted by Gayle Graff who was dressed in a robe and was carrying her son. One of the officers believed, from earlier observation of the house, that Gayle was living there. The officers told her that they were looking for money and a gun. At this time the officers did not know where in the house, if anywhere, the money or gun was located, nor did they know which part of the house, if any, had been occupied by the defendant. They asked Gayle whether they could search the house. They did not tell her that she was not required to consent to the search. She consented. She told the officers that the east bedroom was occupied by the defendant and by her. She consented to a search of the east bedroom. She told the officers that she used the top two drawers of a dresser in the east bedroom and the defendant used the bottom two drawers. None of the officers made any inquiries concerning whether the defendant occupied the east bedroom as a guest or as a paying tenant, nor whether the defendant and Gayle were married or whether they had been living together regularly in the Marshall house or elsewhere, and nothing was said to the officers on these subjects. Certain items were found by the searching officers in the second drawer from the bottom of the dresser and in the closet of the east bedroom.

The second search occurred at about 10:15 a.m., within a few minutes after the conclusion of the first search. The same local officers returned to the house and were admitted by Gayle Graff. They said that they wished to continue their search. They did not tell her that she was not required to consent. She

consented. Certain items were found in a downstairs pantry.

The third search occurred at about 4:30 p.m. Two special agents of the Federal Bureau of Investigation and two local law enforcement officers participated in it. The two special agents and one of the local officers went to the Marshall house at about 3:30 p.m. They were admitted to the house by Steven. They sat in the kitchen and conversed with Steven. Elaine Marshall was brought to the house by the second local officer. The officers introduced themselves to her, told her they wished to search the house, and informed her that she had a right to decline. She executed a written consent to a search of the entire house. She told them that she and her husband rented the house. No inquiry was made concerning whether the defendant had been living in the house as a paying or non-paying guest. The search was made. Certain items were found in a drawer of the dresser in the east bedroom, and certain items downstairs.

OPINION

With respect to any items found in any of the three searches in places other than the east bedroom, the motion to suppress must be denied. With respect to the parts of the house other than the east bedroom, whether the consent of Gayle Graff in the morning or that of Elaine Marshall in the afternoon was effective is irrelevant. Defendant enjoys no standing to dispute the lawfulness of the search in those other parts of the house. *Alderman v. United States*, 394 U.S. 165, 174 (1969).

With respect to the third search (in the afternoon), any evidence found in the east bedroom must be suppressed. Even if we were to assume the correctness of the government's contention that the lawfulness of the

search is to be tested by how matters reasonably appeared to the officers, rather than by the objective reality of the situation, there is nothing to support the further contention that it reasonably appeared to the officers that the defendant had been occupying the east bedroom as a non-paying guest. They made no inquiry on the subject and nothing was said to them on the subject.

The most difficult question concerns any items which may have been found in the east bedroom during either the first or second search in the morning. The issue is whether the consent by Gayle Graff was effective to bind the defendant. A threshold question is whether consent in such a situation is effective only if the woman is actually lawfully married to the defendant. For the moment, I will assume, without deciding, that the consent can be effective if there is a sufficiently close relationship, of sufficiently long standing, even in the absence of a lawful marriage. If we apply the "reasonable appearances" test for which the government contends, it is necessary to consider the effect of Gayle Graff's statement to the officers that she and the defendant both occupied the east bedroom. She also said, at some time, that she used the two top drawers of a dresser in that room and he used the bottom two; it is not clear whether this was said before the officers entered the room; it is reasonable to infer that it was not said until after they had entered the room and had at least seen the dresser, and it is also reasonable to infer that it was said after the dresser had actually been searched; I disregard the statement by Gayle Graff about the dresser as a possible prop for "reasonable appearances" just prior to the search. It is also true that later in the day,

Gayle was interviewed by the two federal agents and made various statements to them bearing on her relationship with the defendant. However, these subsequent statements to the federal officers obviously have no bearing upon how the matter appeared earlier to the local officers. I conclude that even if a continuing pattern of living together in a certain space is sufficient to make the woman's consent binding upon the man, the appearance of things in the morning of November 12, prior to the search of the east bedroom, did not provide a reasonable basis for the searching officers to believe that such a pattern had existed. On this basis, the evidence found in the east bedroom in the morning must be suppressed.

Moreover, neither with respect to the consent by Elaine Marshall in the afternoon nor the consent by Gayle Graff in the morning to a search of the east bedroom, can I accept the "reasonable appearances" test. The government argues that the only justification for the exclusionary rule is to "penalize police officers who have acted improperly." I agree that deterrence of improper police practices in the future is one of the hoped for consequences of the exclusionary rule.² But I consider that the exclusionary rule has another wholesome purpose. Whether or not the effect of excluding evidence in this case is to deter the police from unlawful searches in future cases, defendant is entitled to have it excluded simply

² In the view I take of the motion, it is unnecessary to determine whether it is proper police practice to refrain from applying for a search warrant and, some seven hours after defendant's arrest, to attempt to justify a search on the basis of consent, without careful preliminary inquiry into the facts upon which the validity of the consent will ultimately depend.

because it was obtained in a warrantless search, which had not been consented to by him or by anyone who had a right, in fact, to bind him by her consent. It must be the true, factual relationship between the defendant and the consenter, rather than the apparent relationship, which controls.

Applying the test of reality here, rather than the test of appearance, there is no evidence, admissible as against the defendant, that there was any relationship between him and Gayle Graff, other than that of friends, both of whom were living in her parent's home. Extra-judicial admissions by her on the subject are not binding against him, as to their truth. Also applying the test of reality, rather than the test of appearance, I have found as fact—not controverted in this record—that the defendant was a paying tenant in the room. Thus, on the hard record here, this defendant cannot be bound by consent given either by his lessor, Elaine Marshall, or his friend, Gayle Graff.

The government argues that if the court should decide to apply the reality test, rather than the appearance test, it is the defendant's burden to prove the real relationship between him and the consenter. As I have indicated, even if this burden is the defendant's, he has met it with respect to the lessee-lessor relationship between him and Elaine Marshall. However, this burden should not rest on the defendant. When law enforcement officers choose to forego the search warrant procedure and to depend, instead, upon consent given by someone other than the person against whom the evidence sought will be used, and when the validity of that consent is later challenged, it is reasonable that the government should bear the

burden of proving that the relationship of the consenter to the accused was in fact a relationship which justifies making the consent binding upon the accused. Neither with respect to the consent by Elaine Marshall nor the consent by Gayle Graff has the plaintiff met this burden.

Finally, the government has requested that if the court should decide that the test of reality is to govern and that the government bears the burden of proving the actual relationship between the consenter and the defendant, then the hearing should be resumed to permit the government to meet this burden. Under the circumstances, I consider the request reasonable. The "circumstances" are that during the course of the two evidentiary hearings already held on the suppression motion, neither counsel for the government, nor counsel for the defendant, nor the court enjoyed a clear understanding of the test which would be applied in determining the validity of the consents, nor of where the burden of proof would be placed.

Accordingly, provision is made in the following order for a resumed hearing if the government desires one.

ORDER

IT IS ORDERED that the motion to suppress those items discovered and seized in the east bedroom of the Marshall house on November 12, 1970, is hereby granted; the said items are to be returned to the defendant.

IT IS ORDERED that the motion to suppress any other item discovered and seized in the Marshall house of November 12, 1970, is hereby denied.

This order shall become effective on the 11th day after its entry; provided, however, that if within said the holding of said evidentiary hearing and a further evidentiary hearing on the suppression motion, the effective date of this order shall be stayed, pending the holding of said evidentiary hearing and a further ruling by the court thereafter.

Entered this 28th day of May, 1971.

By The Court:

JAMES E. DOYLE,
District Judge.

